

**PRELIMINARY ANALYSIS OF IMPLICATIONS OF
STATE/DISTRICT NONPARTICIPATION IN NCLB**

Introduction The following chart provides a preliminary analysis of three major positions expressed by the U.S. Department of Education (ED) in the recent letter from Eugene Hickock (ED Acting Deputy Secretary) to Steven Laing (Utah Superintendent of Public Instruction) dated February 6, 2004 (ED letter) regarding the implications of state and/or district refusal of federal funds under the No Child Left Behind Act of 2001 (NCLB). This is a *preliminary* analysis, and further information is forthcoming, particularly with regard to particular NCLB references made in the ED letter and summarized in the table below. Finally, this analysis is not intended to encourage states to reject NCLB funds. Rather, it is simply designed to explain the position of ED with regard to the consequences of such action so that each state can properly assess its course of action when participating in federal education programs.

Summary Congress enacted NCLB under its Spending Clause authority, under which entities that choose to receive federal funds generally must abide by program requirements. Thus, each state and/or district generally has the authority under federal law to decline NCLB funds in whole or part and be excluded from the relevant program requirements. However, NCLB is a highly integrated statute – with many requirements linked across Titles of the Act, particularly with regard to Title I, Part A. And the ED letter indicates that it is ED’s intent to interpret these linkages as broadly as possible – meaning that a state or district that refuses federal funds under one NCLB Title, such as Title I, may face consequences under other Titles, including (1) still having to meet Title I requirements that are cross-referenced in other Titles and/or (2) having funds under other Titles reduced where the funding formula cross-references Title I funding. This broad reading of NCLB’s integrated requirements is questionable, and ED likely could have reached other reasonable interpretations that would be more supportive of state opt-out authority. But it is important to note that ED, as the Federal administrative agency charged by Congress with interpreting and enforcing NCLB, will likely be afforded some deference in its interpretation by the courts. Therefore, the ED letter regarding the likely implications of state or district nonparticipation in NCLB is crucial for understanding the decisions regarding participation facing states.

Summary and Preliminary Analysis of ED Letter

ED Position (according to ED Letter)	NCLB Citation(s)	Analysis
<p>1. State or district refusal of federal funds under some or all of NCLB would remove some but not all federal requirements, depending on the relevant Titles of the Act. More specifically:</p> <ul style="list-style-type: none"> ▪ <i>Districts</i> that decline Title I, Part A, funds would be exclude ED from district-specific requirements (e.g., likely public school choice requirements), but would still have to meet requirements that apply to the district based on <i>state receipt</i> of Title I funds, including (1) assessing all students in reading/language arts and math, (2) making AYP determinations for all public schools, and (3) ensuring that all teachers are “highly qualified.” ▪ <i>States or districts</i> that receive <i>any NCLB</i> funds must meet the requirements regarding unsafe school choice. And <i>districts</i> that receive any NCLB funds must also meet the requirements regarding access of military recruiters and certification that no policies interfere with constitutionally protected prayer. ▪ <i>States or districts</i> that receive <i>any ED</i> funds must meet the requirements regarding equal access to Boy Scouts. ▪ Finally, while not expressly stated in the ED letter, it is likely ED’s position that <i>states</i> that decline Title I funds would be excluded from requirements under Title I, but the states would still have to meet those Title I requirements to the extent that the state participates in other Titles that cross-references those Title I requirements (e.g., Title Iain’s reference to AYP for ELL students). 	<ul style="list-style-type: none"> ▪ § 1111(b)(3) ▪ § 1111(b)(2) ▪ § 1119 ▪ 20 U.S.C. § 7912 ▪ 20 U.S.C. § 7908 ▪ 20 U.S.C. § 7904 ▪ 20 U.S.C. § 7905, 7912 	<ul style="list-style-type: none"> ▪ <i>ED’s interpretation would likely be found to be reasonable, except that it may be legitimate to raise questions regarding precisely what is required under a given NCLB Title where those requirements are based only on cross-references to Title I. E.g., states that refuse Title I funds but accept Title III funds could be required to determine AYP for ELL students, but may not be required to determine AYP more broadly.</i>
<p>2. States or districts that decline federal funds under one NCLB Title, particularly Title I, Part A, would have funds reduced under other NCLB Titles to the extent that the funding formula under other Titles are “linked to” Title I funding. More specifically:</p> <ul style="list-style-type: none"> ▪ State and/or district refusal of Title I fund would reduce state funding under (but not necessarily limited to): <ul style="list-style-type: none"> - State and Local Technology Grants (Title II, Part D, Subpart 1) - Safe and Drug Free Schools and Communities (Title IV, Part A) 	<ul style="list-style-type: none"> ▪ § 2411(a)(2) ▪ § 4111(b)(1)(B) 	<ul style="list-style-type: none"> ▪ <i>ED’s position here is likely based, in part, on the plain language of the statute. E.g., Title IV, Part A (SDFSa) states that the amount of Title IV funds a state receives is in part contingent on the ratio of funds the state received under Title I relative to other states. However, it could be argued that congressional intent was not to condition Title IV funding on Title I funding, but to use the same formula and percentage to determine each state’s Title IV</i>

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<ul style="list-style-type: none"> - 21st Century Community Learning Centers (Title IV, Part B) - Comprehensive School Reform (Title I, Part F) (state only) - Even Start (Title I, Part B, Subpart 3) (state only) - Education for Homeless Children and Youth (Title VII, Subtitle B of the McKinney-Vento Homeless Assistance Act) (state only) - Reading First (Title I, Part B, Subpart 1) (district only) 	<ul style="list-style-type: none"> ▪ § 4202(b)(1) ▪ § 1602(a)(2)(B) ▪ § 1232(d)(2) ▪ 42 U.S.C. § 11432 ▪ § 1202(c)(2)(A) 	<p><i>eligibility, as was ED to determine its Title I eligibility. [It will be important to determine if there is any legislative history or prior ED action relevant to this point.]</i></p> <ul style="list-style-type: none"> ▪ <i>Also, even under ED's interpretation, the practical impact will vary from program to program and state to state. E.g., NCLB programs generally establish a minimum amount that states must receive regardless of Title I funding.</i> ▪ <i>Finally, there is some potential inconsistency in ED's position of holding states to any Title I requirements cross-referenced in other Titles, but not allowing states to receive relevant funding that links to Title I. [?]</i>
<p>3. State or district refusal of NCLB funding would not affect the ability to participate or receive funds under several other education programs. More specifically:</p> <ul style="list-style-type: none"> ▪ States that do not participate in NCLB formula grant programs could generally still apply for discretionary grant programs, e.g., Teaching of Traditional American History, Magnet Schools, or Voluntary Public School Choice programs. ▪ States that do not participate in NCLB could still receive funds under other ED or federal programs, e.g., Carl D. Perkins Vocational and Technical Education Act, Adult Education and Family Literacy Act, Individuals with Disabilities Education Act, and National School Lunch Act. 		<ul style="list-style-type: none"> ▪ <i>ED's position is likely reasonable and indicates that states have some flexibility to decline NCLB funds and still participate in other federal education programs.</i>